



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Leigh Instruments Limited
File: B-233270
Date: March 3, 1989

DIGEST

Protest is sustained where offer of protester, a Canadian firm, was excluded from the competitive range because it did not include an endorsement from the Canadian Commercial Corporation (CCC). Although submission of a CCC endorsement is a material requirement, the failure to submit such an endorsement is a defect that could easily be cured during discussions.

DECISION

Leigh Instruments Limited protests the Naval Air Systems Command's rejection of its offer for navigational sets under request for proposals (RFP) No. N00019-88-R-0024. The Navy rejected Leigh's offer because the firm, which is Canadian, had not included with its offer an endorsement from the Canadian Commercial Corporation (CCC). Leigh points out that a CCC endorsement was submitted shortly after the closing time set for the receipt of proposals and argues that its proposal should have been considered despite the fact that the CCC endorsement was late. We sustain the protest.

The solicitation, as amended, set the closing date as July 7, 1988, at 10 a.m. Three firms responded with timely proposals. Leigh submitted an offer on its own behalf, as permitted by the Department of Defense Supplement to the Federal Acquisition Regulation (DFARS), § 225.7104(a)(2)(ii). This regulation provides for the following exception to the general rule that contracts with Canadian firms are to be made with the CCC, which then in effect sub-contracts performance of the contract to a specific firm:

"(ii) When a Canadian offer cannot be processed through the Canadian Commercial Corporation in time to meet the bid-opening requirement or the

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closing date for receipt of proposals, the Corporation is authorized to permit Canadian firms to submit offers directly; Provided, That the Canadian offer and the Canadian Commercial Corporation endorsement are both received by the contracting officer prior to bid opening or the closing date for receipt of proposals."

The agency concluded that from a technical standpoint Leigh should be included within the competitive range. It was discovered, however, during the evaluation of proposals that Leigh had not submitted a CCC endorsement with its offer. The contracting officer contacted an official of the CCC, who supplied documentation indicating that an endorsement had been transmitted to the Navy by telecopy machine at 11:37 a.m. on July 7. Since the endorsement was not transmitted until after the time set for closing, the Navy concluded that it was late and that the Leigh offer should therefore be rejected. The agency further concluded that the other two offerors should be included in the competitive range and that they would be requested to submit best and final offers.

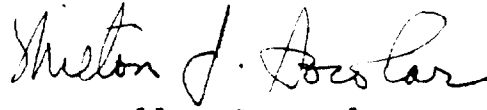
The Navy's rationale for rejecting Leigh's offer is straightforward: DFARS § 225.7104 requires that the CCC endorsement be received prior to the closing date for receipt of proposals, and the endorsement of Leigh's proposal was not.

We think that under the circumstances the agency's literal interpretation of the regulation is too restrictive. Although the submission of a CCC endorsement is a material requirement of the solicitation, DFARS § 225.7104(a)(2); Windet Hotel Corp., B-220987, Feb. 6, 1986, 86-1 CPD ¶ 138, an offeror's failure to comply with a material requirement in an initial offer does not, as a general rule, require exclusion of its proposal from the competitive range where, as here, the defect is one that could easily be cured through discussions. Consolidated Engineering, Inc., B-228142.2, Jan. 13, 1988, 88-1 CPD ¶ 24. In view of this rule, we do not think that it is reasonable to read the regulation as precluding an offeror from correcting its failure to submit a timely CCC endorsement where it is clear that the offer in fact had CCC approval and was otherwise considered to be within the competitive range.

Consequently, we recommend that the agency again include Leigh's offer within the competitive range. We also find that Leigh is entitled to recover the costs of filing and pursuing the protest, including attorneys' fees. Bid

Protest Regulations, 4 C.F.R. § 21.6(d)(1) (1988). Leigh should submit its claim for such costs directly to the Navy. 4 C.F.R. § 21.6(e).

The protest is sustained.

for 
Comptroller General
of the United States